88-548

No. 88-

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT P. NEWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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28 pp

QUESTION PRESENTED

Does Rule 6(e) of the Federal Rules of Criminal Procedure completely divest federal courts of their inherent supervisory power to unseal grand jury records for reasons that are not expressly set forth in Rule 6(e)?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner, Robert P. Newman, filed a petition in the United States District Court for the District of Columbia to unseal certain grand jury records. He served a copy of this petition on the United States Attorney for the District of Columbia, and the United States opposed the petition both in the district court and the court of appeals. The subject of the grand jury proceedings, Owen Lattimore, expressly waived any interest in maintaining the records under seal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

ROBERT P. NEWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion and orders of the United States Court of Appeals for the District of Columbia Circuit are not reported and are reproduced in the Appendix ("App.") at pages 1a-6a. The order of the United States District Court for the District of Columbia is also not reported and is reproduced at App. 7a.

JURISDICTION

The judgment and opinion of the court of appeals were entered on April 20, 1988, and that court denied the timely petition for rehearing and suggestion for rehearing *en banc* on July 1, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> **(3) Exceptions.**
>
> **(A)** Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> > **(i)** an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

* * *

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

* * *

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

STATEMENT OF THE CASE

Petitioner Robert P. Newman, a Professor in the Department of Communication at the University of Pittsburgh, is writing a biography of Owen Lattimore, the subject of a McCarthy-era perjury prosecution. Because Professor Newman is seriously hindered in his work by the unavailability of the transcripts of the grand jury proceedings that led to Lattimore's indictments, he filed a petition in the United States District Court for the District of Columbia asking the court to exercise its discretion under its inherent supervisory authority and the All Writs Act, 28 U.S.C. § 1651, to unseal the grand jury transcripts.

The public interest in disclosure of these transcripts is great. In the late 1940s, Lattimore was a prominent China scholar alleged to be sympathetic to the Communists. Senator Joseph McCarthy accused Lattimore of "losing China" to the Communists, and Senator Patrick McCarran interrogated him in prolonged Senate hearings. Senator McCarran's political pressure led the Justice Department to obtain indictments charging Lattimore with perjury for his congressional testimony, despite the FBI's lack of confidence in the case, which was shared

by several prosecutors and reiterated by the courts which dismissed several counts of the indictments. *United States v. Lattimore*, 112 F. Supp. 507 (D.D.C. 1953), *aff'd in part, rev'd in part*, 215 F.2d 847 (D.C. Cir. 1954)(*en banc*); *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955)(*en banc) (per curiam*). The government's lack of confidence in the case ultimately led to its voluntary dismissal of the remaining counts after the political pressure subsided as a result of the passage of time and the death of Senator McCarran. Thus, the Lattimore indictments call into question the extent to which unchecked prosecutorial power and congressional influence may have been used to engineer a political prosecution and to employ the grand jury for improper purposes.

Along with his petition to unseal the Lattimore grand jury records, Professor Newman submitted a detailed affidavit recounting the facts of the Lattimore indictments and substantiating his need to review the grand jury transcripts in order to complete his research. His affidavit also attested to the absence of any interest in continuing grand jury secrecy because the legal proceedings had been concluded more than thirty years ago and most of those involved, including many grand jury witnesses, had since died. Mr. Lattimore submitted a supporting affidavit, waiving his privacy interests in the transcripts, and Professor Newman submitted additional affidavits from the President of the American Historical Association attesting to the importance of the Lattimore grand jury transcripts for historical research, and from Professor Stanley I. Kutler, a historian who has written about the Lattimore indictments, stressing the importance of the transcripts for a scholarly study of the Lattimore case.

Professor Newman served his petition on the United States Attorney for the District of Columbia, who then filed the grand

jury transcripts with the district court under seal and opposed the petition. In its opposition, the government did not dispute the strong public interest in completing the historical record of this highly publicized chapter of the McCarthy era. Nor did it question Professor Newman's particularized need for the transcripts. Moreover, it never suggested that any concrete harm would flow from disclosure of the records that Professor Newman seeks. Rather, the government's sole objection was based on its view that the federal courts may unseal grand jury records only where Rule 6(e) expressly allows them to do so. Without hearing argument or issuing an opinion, Chief Judge Aubrey Robinson agreed and issued a one-sentence order stating "the petition is denied." App. 7a.

Professor Newman appealed this ruling, and the government moved for summary affirmance. In an opinion dated April 20, 1988, a panel of the D.C. Circuit affirmed, based solely on the proposition, never disputed by petitioner, that "the 'general rule of secrecy,' under Fed. R. Crim. P. 6(e)(2), while allowing certain exceptions, makes no provision for disclosure of grand jury transcripts to a private party for historical research purposes." App. 2a. The court cited *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979), for the principle, never even addressed in that case, that courts may unseal grand jury materials *only* for reasons specified in Rule 6(e), App. 2a, and held that "[s]ince a claim of historical importance, without more, falls outside the scope of the Rule 6(e)(3) exceptions permitting disclosure, the district court's denial of Professor Newman's petition to unseal the Lattimore grand jury transcripts was appropriate." *Id.* 3a. The court never acknowledged, let alone discussed, petitioner's claim that Rule 6(e) is not the sole basis for disclosure of grand jury records, but that courts may unseal grand jury materials under their inherent supervisory authority over the grand jury for other reasons as well. Professor Newman filed a petition for

rehearing and a suggestion for rehearing *en banc*, which the court denied in orders issued on July 1, 1988. App. 4a-6a.

REASONS FOR GRANTING THE PETITION

Federal courts, including the five courts of appeals that have addressed the issue, are decidedly split on the question of whether federal courts may unseal grand jury records for reasons that are not set forth in the Rule 6(e) exceptions. On the one hand, the Second, Seventh, and Eleventh Circuits, joined by the District of Maryland, have held that courts have the discretion to unseal grand jury materials for reasons that are not set forth in Rule 6(e). On the other, the Fifth Circuit has ruled, as the D.C. Circuit did in the instant case, that courts have no authority to unseal grand jury records unless Rule 6(e) expressly authorizes the disclosure.

In *In re Biaggi*, 478 F.2d 489 (1973), the Second Circuit ordered the disclosure of the grand jury testimony of Mario Biaggi, then a candidate for mayor of New York City, who had claimed that such disclosure would dispel campaign charges that he had invoked the Fifth Amendment in response to questions about his campaign finances. Writing for the majority, Judge Friendly held that federal courts have discretion to determine whether grand jury records should be disclosed, even where the request for access does not fall within the Rule 6(e) exceptions to grand jury secrecy, and concluded that the public interest warranted disclosure of Biaggi's testimony. *Id.* at 492-93. Judge Hays dissented from this ruling on the ground that courts have no authority to create exceptions to grand jury secrecy in addition to those in Rule 6(e). *Id.* at 493-94.

In another noteworthy case — *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1267-68 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984) — the Eleventh Cir-

cuit affirmed the district court's order disclosing the grand jury records leading to the indictment of Judge Alcee Hastings to the Investigating Committee of the Judicial Council for the Eleventh Circuit for use in its investigation of Judge Hastings' conduct. In so doing, the court upheld the district court's ruling "that Rule 6(e) did not preclude it 'from fashioning an alternative method for disclosure under its general supervisory authority over grand jury proceedings and records.'" 735 F.2d at 1268-69, *quoting* 576 F. Supp. 1275, 1280 (S.D. Fla. 1983).[1]

The Seventh Circuit has similarly ruled that courts may disclose grand jury records for reasons that do not fall within a Rule 6(e) exception. In *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973), the court permitted public disclosure of a grand jury report pertaining to a Chicago police raid on the Black Panthers based on the district court's finding that disclosure was in the public interest, notwithstanding the absence of an applicable Rule 6(e) exception. In subsequent cases, the Seventh Circuit reaffirmed judicial discretion "to slip entirely around Rule 6(e) and permit disclosure," even though it concluded that the request at issue in one such case — the IRS' assessment and collection of taxes — did not supply a com-

[1]In a subsequent case, the Southern District of Florida exercised its discretion to disclose grand jury materials to the House Judiciary Committee for use in its impeachment investigation of Judge Hastings, but declined to release the same records to the public because Judge Hastings, who requested public disclosure, had "not shown a particularized need for public release sufficient to justify an exception to this general rule [of secrecy]." *In re Grand Jury Proceedings of Grand Jury No. 81-1*, 669 F. Supp. 1072, 1078 (S.D. Fla. 1987). The Eleventh Circuit upheld the disclosure to the House Judiciary Committee on the ground that it fell within the Rule 6(e) exception for disclosures "preliminarily to . . . a judicial proceeding;" the denial of public disclosure was not appealed. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (11th Cir. 1987); *see also In re Grand Jury Proceedings (Alcee Hastings)*, 841 F.2d 1048 (11th Cir. 1988)(ordering further disclosure of grand jury records to House Judiciary Committee for its impeachment investigation).

pelling need for such disclosure, and that, in the other, the parties had not asked the court to exercise its supervisory authority. *In re Special February, 1975 Grand Jury (Baggot)*, 662 F.2d 1232, 1235-36 (7th Cir. 1981), *aff'd on other grounds sub nom. United States v. Baggot*, 463 U.S. 476 (1983)(IRS civil tax audit is not "preliminar[y] to or in connection with a judicial proceeding" within Rule 6(e) exception); *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079, 1088 (7th Cir. 1982), *rehearing granted on other grounds*, 717 F.2d 1136 (7th Cir. 1983)(vacated and remanded in light of *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983)).

District courts have likewise disclosed grand jury records in situations that are not covered by Rule 6(e) exceptions. In one case that is remarkably similar to this one, a history professor sought access to the grand jury transcripts pertaining to the indictments of William Remington, a prominent public official who was accused of being a Communist during the McCarthy era. *In re Petition of May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987). Judge Whitman Knapp unsealed the grand jury transcripts, recognizing that, although "petitioner's request does not fall within the legislatively defined exceptions of Fed. R. Crim. P. 6(e)[, i]t has, however, been established in this circuit that in an extraordinary case the court need not confine itself to the strictures of Rule 6(e), but may exercise its discretion to permit disclosure." *Id.* at 2199, *citing In re Biaggi, supra*. Based on the "undisputed historical significance" of the Remington affair, the public's "strong interest in having its understanding of the administration of justice in this case based on complete and accurate historical evidence," and the court's conclusion that none of the purposes of grand jury secrecy "has the remotest application to the situation at bar," the court granted the historian access to the transcripts. 13 Media L. Rep. (BNA) at 2199. *See also*

In re Presentment of Special Grand Jury Impaneled January, 1969, 315 F. Supp. 662 (D. Md. 1970)(public disclosure of grand jury presentment that the Department of Justice directed the United States Attorney not to sign).[2]

In contrast to these holdings, the Fifth Circuit has ruled that courts have no authority to disclose grand jury materials unless Rule 6(e) authorizes the disclosure. In response to a request by the Federal Energy Regulatory Commission for access to grand jury records as part of its investigation of possible construction overcharges, the court concluded that the request did not fall within a Rule 6(e) exception and stated, without any further discussion, that "[a] district court to whom application for disclosure is made does exercise discretion in granting disclosure but may not thereby enlarge the exceptions to grand jury secrecy." *In re June 20, 1977 Concurrent Grand Jury Investigation (J. Ray McDermott & Co., Inc.)*, 622 F.2d 166, 172 (5th Cir. 1980). Similarly, although the Tenth Circuit has not expressly ruled on this issue, it held in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), that the district court had no authority to allow disclosure of grand jury materials to a private investigator because Rule 6(e) did not permit the disclosure, thereby suggesting that Rule 6(e) supplies the sole authority for disclosure of grand jury materials.

Several district court decisions have also construed Rule 6(e) to divest judges of the power to disclose grand jury materials in circumstances not spelled out in the Rule. Thus, in *Hiss*

[2]Although the government initially appealed *May*, it later withdrew its appeal and provided Professor May with the Remington grand jury transcripts in their entirely. Amended Order (S.D.N.Y. Apr. 17, 1987). The district court subsequently awarded the petitioner May attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, on the ground that the government's position was not substantially justified, the government again appealed, and the fee matter was settled on appeal. Memorandum & Order (S.D.N.Y. June 14, 1988).

v. Department of Justice, 441 F. Supp. 69 (S.D.N.Y. 1977), another judge in the Southern District of New York found no authority for disclosure of historically significant grand jury records to the subject of the investigation, although this ruling conflicts with the earlier decision of the Second Circuit in *Biaggi* and the subsequent decision of the Southern District of New York in *May*. Similarly, another judge in the District Court for the District of Columbia concluded that he was not "empowered to carve out a new exception to accommodate" a request from a congressional committee for access to grand jury records in *In re Grand Jury Investigation of Uranium Industry*, 1979-2 Trade Cases (CCH) ¶ 62,798 (D.D.C. 1979). Although that decision is consistent with the rulings in this case, it conflicts with the D.C. Circuit's earlier holding in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974)(*en banc*), *denying writ of mandamus, In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974)(rejecting contention that Rule 6(e) limited trial court's discretion to make disclosures of grand jury records in the public interest and disclosing Watergate grand jury report to House Judiciary Committee for its impeachment investigation); *see also In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952) (disclosing police inspector's grand jury testimony to Commissioners of the District of Columbia for public corruption investigation).

The D.C. Circuit's decision in this case, as well as the other decisions finding Rule 6(e) to be the exclusive authority for access to grand jury records constitute what appears to be the minority view. Moreover, they depart from the tradition of judicial authority over grand jury materials and Rule 6(e)'s continuation of that authority. Since the grand jury is an "arm of the court," *Levine v. United States*, 362 U.S. 610, 617 (1960), and its records are records of the court, *United States*

v. Procter & Gamble Co., 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring), federal courts have exercised supervisory authority over both the grand jury and its records. Thus, historically, disclosure of grand jury records has been committed to the sound discretion of the trial judge. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940).

Although Rule 6(e) has specified certain circumstances which may warrant release of grand jury records, the 1944 Advisory Committee notes confirm, as the cases discussed above recognized, that the rule did not supplant the trial court's inherent authority: "[t]his rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e), Advisory Committee Notes. The evolution of Rule 6(e) since 1944 likewise confirms that it has never been the exclusive basis for disclosure of grand jury records. Thus, Congress amended Rule 6(e) in 1977 to authorize the practice of allowing government attorneys to disclose grand jury materials to other government personnel who assist them in performing their duties. Fed. R. Crim. P. 6(e), Advisory Committee Notes to 1977 Amendment; *see, e.g., In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971)(court permitted disclosure to IRS agents assisting Department of Justice probe); *see generally United States v. Sells Engineering, Inc.*, 463 U.S. 418, 436-37 & n.22 (1983). Similarly, a 1983 amendment to Rule 6(e) incorporated the case law permitting disclosures from one federal grand jury to another; as the advisory committee notes confirm: "[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances." Fed. R. Crim. P. 6(e)(3)(C), Advisory Committee Notes to 1983 Amendment. Likewise, a 1985 amendment resolved a split in the case law in favor of allowing government attorneys to

disclose grand jury materials, without prior judicial approval, to state government personnel assisting them in their duties. Fed. R. Crim. P. 6(e)(3)(A)(ii), Advisory Committee Notes to 1985 Amendment. Thus, rather than viewing Rule 6(e) as the sole authority for unsealing grand jury records, courts have often gone beyond its terms when the public interest warrants disclosure, and the Rule has thereafter been modified to reflect current judicial trends.

In sum, the D.C. Circuit's decision limits judicial authority to the terms of Rule 6(e), without reconciling this limitation with the tradition of judicial authority over grand jury records or the history of Rule 6(e), and without considering the serious consequences it holds for historians and others not covered by specific Rule 6(e) exceptions. Both the approach and result of the decision below conflict with those of the Second, Seventh, and Eleventh Circuits, as well as several district courts. The decision also threatens to cut off all access to grand jury records by historians and others who have a genuine need to review them, even where such access would cause no harm to the grand jury or any interests associated with it. Since many McCarthy-era grand juries as well as those from other politically charged times sat in the District of Columbia, the D.C. Circuit's decision places critical information about historically important chapters of history off limits to historians and the public. For all of these reasons, this case warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5345 **September Term, 1987**
MISC. C.A. No. 87-0230

In re: Petition of Robert P. Newman

BEFORE: Ruth B. Ginsburg, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellee's motion for summary affirmance and the opposition thereto, it is

ORDERED by the court that the motion for summary affirmance be granted for the reasons stated in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

FILED APR 20, 1988

CONSTANCE L. DUPRE
CLERK

No. 87-5345—*In re Petition of Robert P. Newman*

MEMORANDUM

Appellant Newman appeals the district court's denial of his petition to unseal the transcripts of certain McCarthy-era grand jury proceedings. Appellant argues the transcripts at issue are of historical significance and should be disclosed to him, as there is no claim that disclosure would cause any harm. The Government moves to summarily affirm the district court's order, asserting that the "general rule of secrecy," under Fed. R. Crim. P. 6(e)(2), while allowing certain exceptions, makes no provision for disclosure of grand jury transcripts to a private party for historical research purposes. We agree and affirm the district court's judgment.

As a starting point, the Supreme Court has emphasized "that the proper functioning of the grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). *See* Fed. R. Crim. P. 6(e)(2). Recognizing the limited exceptions to the rule of secrecy (as delineated in Fed. R. Crim. P. 6(e)(3)), courts are nonetheless reluctant to "lift unnecessarily the veil of secrecy from the grand jury." 441 U.S. at 219.

Drawing from its decisions in *U.S. v. Procter & Gamble Co.*, 356 U.S. 677 (1958), and *Dennis v. U.S.*, 384 U.S. 855 (1966), the Supreme Court, in *Douglas Oil*, devised a balancing test for deciding when disclosure of grand jury material may be appropriate within the bounds set forth in Rule 6(e)(3). If the purpose for which the disclosure is sought falls within one of the Rule 6(e)(3) categories, and if the private party seeking disclosure can demonstrate ultimately that the "particularized need" for disclosure (*see, e.g., U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983)) outweighs the public interest in

secrecy and the possible chilling effect on future grand jury proceedings, only then may the court permit disclosure. *Douglas Oil*, 441 U.S. at 223.

Professor Newman seeks the Lattimore transcripts for historical purposes, solely to reveal what transpired during those grand jury proceedings. There is no claim that disclosure is sought in connection with any judicial proceeding[1] or other category of circumstances delineated in Rule 6(e)(3). Those categories are so circumscribed because of the legitimate concern about "the possible effect upon the functioning of future grand juries of unduly liberal disclosure." *In re Donovan*, 801 F.2d 409, 410 (D.C. Cir. 1986) (per curiam). Since a claim of historical importance, without more, falls outside the scope of the Rule 6(e)(3) exceptions permitting disclosure, the district court's denial of Professor Newman's petition to unseal the Lattimore grand jury transcripts was appropriate.

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[1]The judicial proceeding exception, under Rule 6(e)(3)(C)(i), does not contemplate "the very proceeding instituted for the purpose of obtaining disclosure." *Hiss v. Department of Justice*, 441 F. Supp. 69, 70 (S.D.N.Y. 1977), quoted in *Fund for Constitutional Government v. NARS*, 656 F.2d 856, 868 (D.C. Cir. 1981).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5345 **September Term, 1987**

C.A. No. 87-0230
United States Court of Appeals
For the District of Columbia
Circuit
FILED JUL 1, 1988

CONSTANCE L. DUPRE
CLERK

In Re:

Petition of Robert P. Newman

BEFORE: Ruth B. Ginsburg, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing it is

ORDERED, by the court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5345 **September Term, 1987**

C.A. No. 87-0230
United States Court of Appeals
For the District of Columbia
Circuit

FILED JUL 1, 1988

CONSTANCE L. DUPRE
CLERK

In Re:

Petition of Robert P. Newman

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the appellant's suggestion for rehearing *en banc* is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

BY: /s/ Robert F. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald did not participate in this order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 17, 1987

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE PETITION OF ROBERT P. NEWMAN TO UNSEAL OF GRAND JURY PROCEEDINGS — Misc. No. 87-0230 AER

ORDER

UPON CONSIDERATION OF the petition to unseal grand jury transcripts and the United States' opposition thereto, it is this 16th day of September, 1987

ORDERED that the petition is denied.

/s/Aubrey E. Robinson, Jr.
United States District Judge

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK

By */s/ Linda L. Romero*
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 88-548

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT P. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether a district court may release grand jury materials to a private party for the purpose of conducting historical research.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) and the order of the district court (Pet. App. 7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1988. A petition for rehearing was denied on July 1, 1988. Pet. App. 4a-6a. The petition for a writ of certiorari was filed on September 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a professor at the University of Pittsburgh, is writing a biography of Owen Lattimore, a China scholar in the 1940's who was a defendant in two federal criminal cases in the early 1950's. On July 6, 1987,

petitioner filed a motion under 28 U.S.C. 1651 in the United States District Court for the District of Columbia to unseal the transcripts of grand jury proceedings in 1952 and 1954 that resulted in the two indictments of Lattimore.[1] Petitioner submitted affidavits attesting to the value of the grand jury materials for historical research, and he argued that there no longer was any interest in grand jury secrecy, because the prosecution had terminated more than 30 years ago and most of the witnesses involved were now dead. Pet. 4-5; Gov't C.A. Mot. for Summary Aff. 1, 3.

After receiving the government's opposition to petitioner's request, the district court denied petitioner's application. Pet. App. 7a. The court of appeals affirmed in an unpublished order. Pet. App. 1a-3a. It concluded that Fed. R. Crim. P. 6(e)(3), which authorizes the disclosure of grand jury materials under certain circumstances, does not permit a court to disclose grand jury materials to a "private party for historical research purposes." Pet. App. 2a. Relying on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 217 (1979), the court observed that secrecy is

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[1] In the 1952 case, the district court dismissed four of the seven counts in the indictment. *United States* v. *Lattimore*, 112 F. Supp. 507 (D.D.C. 1953). The court of appeals affirmed that decision as to two counts and reversed as to others. *United States* v. *Lattimore*, 215 F.2d 847 (D.C. Cir. 1954) (en banc). The government dismissed the remaining counts of the indictment in 1955. In the 1954 case, the district court dismissed the entire indictment, *United States* v. *Lattimore*, 127 F. Supp. 405 (D.D.C. 1955), and the court of appeals upheld that judgment by a 4-4 vote. *United States* v. *Lattimore*, 232 F.2d 334 (D.C. Cir. 1955) (en banc).

Upon receipt of the petition for release filed by petitioner in district court, the government contacted various depositories in an effort to locate the records. The transcript of the 1952 proceedings was located, but the transcript of the 1954 proceedings was never found. Gov't C.A. Mot. for Summary Aff. 2.

necessary for the proper functioning of the grand jury system, and that a private party bears a heavy burden to show a "particularized need" that outweighs the public interest in secrecy and the possible effects on future grand jury proceedings. Pet. App. 2a-3a. A "claim of historical importance, without more," is not sufficient to justify disclosure of grand jury transcripts, the court of appeals ruled. The court therefore upheld the district court's denial of petitioner's application. Pet. App. 3a.

ARGUMENT

Petitioner does not challenge the court of appeals' ruling that Rule 6(e)(3) does not authorize the disclosure of grand jury materials to a private party who requests the materials for the purpose of conducting historical research. Instead, he contends that the district court should have ordered the disclosure of the requested transcript in the exercise of the court's inherent supervisory power. According to petitioner, a district court has inherent authority to release grand jury materials whenever the court decides that it is in the public interest to do so. That claim does not warrant review by this Court.

Rule 6(e)(2) "codifies the traditional rule of grand jury secrecy" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983)), requiring, for example, the grand jurors and attorney for the government not to disclose matters occurring before the grand jury "except as otherwise provided for in these rules." Rule 6(e)(3) specifies certain limited instances in which the disclosure of grand jury materials otherwise prohibited by the Rule may be made. Disclosure may be made to a government attorney and to other necessary government personnel (federal or state) in the performance of the attorney's duty to enforce the federal criminal law (Rule 6(e)(3)(A)(i) and (ii), (B)), to a

party to another judicial proceeding (Rule 6(e)(3)(C)(i)), to the defendant in a criminal case for the purpose of moving to dismiss the indictment on the basis of, for example, misconduct by the prosecutor before the grand jury (Rule 6(e)(3)(C)(ii)), to another federal grand jury (Rule 6(e)(3)(C)(iii)), or to an appropriate state official to enforce a state criminal law (Rule 6(e)(3)(C)(iv)). Thus, the only exception for the disclosure of grand jury materials outside the context of a criminal case is Rule 6(e)(3)(C)(i), which is limited to those cases where a judicial proceeding or antecedent administrative proceeding is pending. See *United States* v. *Baggot*, 463 U.S. 476 (1983) (disclosure not permitted to the IRS during an audit).

Rule 6(e) contains no general exception for disclosures in the public interest, nor is there a provision authorizing a district court to waive or to make an exception to the general secrecy obligation created by Rule 6(e). It is therefore clear that petitioner has no right to the disclosure of the grand jury transcript under the terms of Rule 6(e)(3), the Rule that specifically provides for disclosure of grand jury materials.

Rather than relying on the Rule that governs disclosure, petitioner invokes the "inherent authority" of district courts to order the disclosure of grand jury materials even when Rule 6(e)(3) would not permit it. While courts in a few unusual cases have permitted disclosure on that basis, those courts have emphasized that ordering disclosure based on courts' "inherent authority" rather than on Rule 6(e) is confined to "special" or "exceptional" circumstances. Because there is nothing "exceptional" about a request to examine grand jury materials based on interest in their contents—whether the interest is scholastic or otherwise—the cases recognizing the courts' "inherent authority" to order disclosure in certain limited circumstances afford no aid to petitioner.

Petitioner first relies on *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). In that case, a newspaper reported that Mario Biaggi, a candidate for Mayor of New York City, had invoked his privilege against compelled self-incrimination in response to numerous questions when he testified before a federal grand jury. Biaggi denied that he had done so, and he sought to have a court examine the transcript to determine whether he had invoked his privilege in connection with questions about his personal finances and assets. The government then moved in district court for the disclosure of the full transcript (with the names of third parties redacted), and Biaggi, after initially opposing the government's motion, asked for the transcripts to be disclosed in their entirety, without any redaction. The district court granted the government's motion, but denied Biaggi's. The Second Circuit affirmed the district court's ruling.

The court of appeals noted that there was no continuing interest in secrecy since both the government and Biaggi, the only witness, had requested disclosure. 478 F.2d at 493. The court further noted that Biaggi's original request for a court to examine the transcripts "was framed, whether wittingly or not, in such a manner as to create a false impression" that Biaggi had not invoked his privilege at all, which was not true. *Id.* at 494. In holding that disclosure was permissible under those circumstances, however, the court emphasized that "[o]ur decision should * * * not be taken as demanding, or even authorizing, public disclosure of a witness' grand jury testimony in every case where he seeks this and the Government consents." *Ibid.* Rather, the court explained that its ruling rested on "the exercise of a sound discretion under the special circumstances of this case." *Ibid.*[2]

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[2] The Second Circuit clearly meant what it said when it emphasized that the court's "inherent authority" to order disclosure was

Another case on which petitioner relies, *In re Petition to Inspect and Copy Grand Jury Materials,* 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984), underscores the limited scope that the courts have given to the "inherent authority" rationale as a basis for permitting disclosure of matters occurring before the grand jury. That case involved an investigation of Judge Alcee Hastings conducted by the Investigating Committee of the Judicial Council of the Eleventh Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. 372. The court of appeals ruled that the district court could order the disclosure of the grand jury materials of the criminal investigation of Judge Hastings to the Investigating Committee as an exercise of the court's inherent supervisory authority over the grand jury. The court, however, carefully limited its holding to the exceptional circumstances of that case. Although the court of appeals found that disclosure was not authorized by any of the specific disclosure provisions of Rule 6(e)(3), the court noted that the Investigating Committee's request made an especially compelling case for disclosure, for several reasons. First, the court found that the statute authorizing the Investigating Committee to "conduct an investigation as extensive as it considers necessary" (28 U.S.C. 372(c)(5)) strongly suggested that Congress intended the Committee to have access to all available evidence, including the product of grand jury proceedings. 735 F.2d at 1269. Second, the court observed that the legislative history of the Act, "[w]hile cryptic, * * * is fairly susceptible to the interpretation that Congress believed that the [district] court could and should

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limited to exceptional cases. That court has not invoked the *Biaggi* rationale in any case since *Biaggi* was decided.

give the investigating judges access to grand jury materials." *Id.* at 1270. Third, the court found a "close correspondence" between disclosure to the Investigating Committee and disclosure of the type permitted under Rule 6(e)(3)(C)(i), which authorizes the district court to disclose grand jury materials "preliminarily to or in connection with a judicial proceeding." 735 F.2d at 1271-1272. Finally, the court noted that the "unique composition" of the Investigating Committee, which consisted entirely of federal judges, helped ensure that the materials would be handled discreetly. *Id.* at 1269.

While authorizing the disclosure of the materials in that case, the court emphasized that the courts "must adhere to Rule 6(e) in 'garden variety' petitions for grand jury disclosure," because Rule 6(e) "was intended to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned." Only in "exceptional circumstances consonant with the rule's policy and spirit" would a court be permitted to go beyond the terms of Rule 6(e). 735 F.2d at 1269. Contrary to petitioner's submissions, the Eleventh Circuit did not sanction a general exception to Rule 6(e) allowing disclosure of grand jury materials whenever a district court believes it to be in the public interest, but only a very narrow exception to the provisions of Rule 6(e)(3). That exception cannot be stretched to include a claim such as petitioner's, which is based on a private person's historical interest in the subject matter of the grand jury's investigation—an interest that could be asserted by virtually any person.[3]

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[3] The other Eleventh Circuit cases cited by petitioner are also inapposite. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (1987), a case related to the Investigating Committee's disclosure request, involved the disclosure of the same grand jury materials to the House Judiciary Committee during its impeachment proceedings against Judge Hastings. That decision does not assist petitioner,

Nor do the Seventh Circuit cases cited by petitioner aid his position. *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1088 (1982), vacated in part, 717 F.2d 1136 (7th Cir. 1983), and *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1236 (7th Cir. 1981), aff'd *sub nom. United States* v. *Baggot*, 463 U.S. 476 (1983), both stated in dictum that a court "may have some discretion in rare situations" to order disclosure in circumstances not covered by Rule 6(e) (662 F.2d at 1235-1236), and that a court "may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice." 662 F.2d at 1236; 687 F.2d at 1088. But the Seventh Circuit did not act on that dictum in either case. On the contrary, the court in both cases ruled that the district court had no inherent authority to disclose grand jury materials to the IRS, and that disclosure would not be permitted unless authorized by Rule 6(e)(3). *Miller*, 687 F.2d at 1088; *Baggot*, 662 F.2d at 1236. Moreover, the court made clear that a district court's discretion under the "inherent authority" rationale is "strictly limited" (662 F.2d at 1236) and would not permitted to serve as a routine means of evading the limits imposed by Rule 6(e). Like the Second and Eleventh Circuit decisions, the Seventh Circuit cases afford no support to

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because the parties agreed that a Senate impeachment trial is a "judicial proceeding" and that a House impeachment inquiry is "preliminary to" the Senate trial, for purposes of the exception in Rule 6(e)(3)(C)(i). 833 F.2d at 1440-1441. The only question in that case was whether the House Committee on the Judiciary had made a sufficient showing of particularized need for the grand jury materials. *Id.* at 1441-1446. *In re Grand Jury Proceedings*, 841 F.2d 1048 (1988), involved a later request for different grand jury materials by the House Judiciary Committee, and therefore is inapposite for the same reasons.

petitioner's submission that the "inherent authority" rationale provides a general exception to the restrictive terms of Rule 6(e)(3).[4]

Contrary to petitioner's contention, there is no conflict among the circuits on the issue presented in this case. The Court of Appeals for the District of Columbia Circuit has not rejected the "inherent authority" rationale for disclosure in all cases, as petitioner contends. In *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the court agreed with the district court's determination that Rule 6(e) did not bar the disclosure of grand jury materials to the House Committee that was considering the impeachment of President Nixon. See 501 F.2d at 715. Nor has the Fifth Circuit done so. In the case of *In re J. Ray McDermott & Co.*, 622 F.2d 166 (1980), the Fifth Circuit held that a regulatory agency could not obtain grand jury materials based on its authority to conduct administrative investigations. Such disclosure, the court held,

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[4] *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973), is of no help to petitioner whatsoever. In a footnote, the court in that case stated in passing that a court can direct disclosure of grand jury material under Rule 6(e) "once the good cause, as used in Rule 34, has been demonstrated." 484 F.2d at 796 n.6. The reference to the "good cause" requirement of Rule 34—apparently a reference to the pre-1970 version of Fed. R. Civ. P. 34—makes it clear that the court was referring to disclosures requested for purposes of civil litigation, a category of disclosure authorized by Rule 6(e)(3)(C)(i). The *Johnson* footnote thus has nothing to do with the authority of district courts to permit disclosure where Rule 6(e) does not authorize it. Nor did the judgment of the court of appeals in *Johnson* implicitly adopt an "inherent authority" exception to Rule 6(e). The court of appeals in that case simply declined to issue a writ of mandamus expunging a report filed by a federal grand jury. Although the filing of the report in *Johnson* revealed certain matters that had occurred before the grand jury, the court of appeals declined to hold that the nondisclosure provisions of Rule 6(e) had overridden the traditional authority of a grand jury to issue a report rather than, or in addition to, an indictment.

would not be made "preliminary to or in connection with a judicial proceeding," as required by Rule 6(e)(3)(C)(i). 622 F.2d at 171-172. The court added that a district court could not simply ignore the language of the Rule and permit disclosure where there was no judicial proceeding anticipated or pending (*id.* at 172), a holding that was subsequently confirmed by this Court's decision in *United States* v. *Baggot, supra*. While *McDermott* stands for the proposition that district courts may not ignore the language of Rule 6(e) and permit disclosure whenever they deem it appropriate, nothing in the *McDermott* opinion forecloses the "inherent authority" rationale if limited to exceptional circumstances that present a compelling case for disclosure.

This case, and cases like this one, are not exceptional cases, and they do not present a compelling claim for disclosure. Petitioner does not claim that denial of disclosure will work some unfairness in civil or criminal litigation, nor does he suggest that disclosure is necessary to ensure that justice is done in an important public proceeding, see *In re Petition to Inspect and Copy Grand Jury Materials, supra*, or to correct some public misapprehension on a matter of widespread public concern, see *In re Biaggi, supra*. Rather, at bottom, petitioner's request for disclosure is simply a request to increase the total amount of information about past events that is available to the public. Even if dressed up as a significant project of historical scholarship, requests of the type made by petitioner could not easily be distinguished from journalistic inquiries into subjects of public interest or requests based simply on individual or public curiosity. The lower courts therefore properly denied the request for disclosure in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The most remarkable feature of the government's brief in opposition is that it entirely abandons both the ruling of the court of appeals and the position that it urged below. Thus, instead of adhering to its previous argument that district courts have no authority to disclose grand jury records beyond that expressly conferred by Rule 6(e), the government now agrees with petitioner that Rule 6(e) does not erect an absolute barrier to access to grand jury records. As a result of this radical shift in position, the government now frames the question presented in this case as "[w]hether a district court may release grand jury materials to a private party for the purpose of conducting historical research." Opp. at I. However, neither court below addressed that question, but decided instead that the absolutist position advanced by the government precluded its consideration.

Thus, at the government's urging, the court of appeals looked no further than the specific exceptions in Rule 6(e) and decided that "[s]ince a claim of historical importance, without more, falls outside the scope of the Rule 6(e)(3) exceptions permitting disclosure, the district court's denial of Professor Newman's petition to unseal the Lattimore grand jury transcripts was

appropriate." App. 3a. In so ruling, the court adopted the government's view that "the explicit terms of Rule 6(e) and previous judicial precedent provide no authority for Courts to infer any 'inherent discretion' to grant the petition," Motion for Summary Affirmance at 3, and therefore "disclosure may not be made 'except as otherwise provided for in these rules.'" District Court Opposition at 2.

Since the court of appeals' decision erects an absolute barrier to access to grand jury records outside of Rule 6(e), which even the government now concedes is unwarranted, it does not raise the question presented by the Solicitor General, but instead raises the very different question presented by petitioner: "Does Rule 6(e) of the Federal Rules of Criminal Procedure completely divest federal courts of their inherent supervisory power to unseal grand jury records for reasons that are not expressly set forth in Rule 6(e)?" Pet. at i.

This shift in the government's position on whether Rule 6(e)'s exceptions are exclusive is confirmed by the Department of Justice's position in another action that arose shortly after the court of appeals adopted that view. In response to a request from the Committee on Standards of Official Conduct of the House of Representatives for access to grand jury records pertaining to Representative Fernand J. St. Germain, the Justice Department "fully support[ed] the Committee's application," even though there is no Rule 6(e) exception for congressional investigations. Department of Justice's Memorandum in Support of Committee's Application for Order Permitting Disclosure of Grand Jury Materials, *In re Possible Violations of 18 U.S.C.§201*, Misc. No. 88-253 (D.D.C., filed Sept. 2, 1988). It is wholly inconsistent for the Department to close the door to petitioner's request by arguing to the court of appeals that Rule 6(e) is an absolute shield, and then join in another request for access to grand jury materials that also falls outside Rule 6(e).

Nor should the government be permitted to defend the deci-

sion below, which accepted its now-abandoned position, by arguing that courts have some inherent authority to unseal grand jury records outside of the Rule 6(e) exceptions, but that it is either improper or unwise for them to exercise that power in the circumstances of this case. Since neither the court of appeals nor the district court ever passed on that question, this Court should vacate the lower court's decision and remand this case for a determination of whether the records should be released under the district court's inherent supervisory authority over grand jury records. Alternatively, given the confusion and disarray in the law in this area, the Court should hear this case to clarify the extent to which federal courts have inherent authority to unseal grand jury records for reasons that are not expressly set forth in Rule 6(e).

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted, and the Court should either vacate the court of appeals' decision and remand this case for further proceedings, or grant plenary review.

Respectfully submitted,

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